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No. 97-1868

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in employment, labor and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals on claims arising out of the workplace, including employee benefits claims. NELA has participated as *amicus curiae* in numerous ERISA cases before this Court. These cases include *Geissal v. Moore Medical Corp.*, ___ U.S. ___, 118 S.Ct. 1869 (1998); *Du Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

NELA has an interest in the application of the Employee Retirement Income Security Act ("ERISA") because the clients of NELA members frequently have employee benefits claims. Insurance companies that provide benefits under ERISA plans have sought to use ERISA preemption to avoid state insurance law doctrines which do not favor their interests. However, ERISA was not intended to replace these legal doctrines, such as the notice-prejudice rule. State insurance law doctrines have been applied—and should

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[1] Pursuant to Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* or its counsel. This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court.

continue to be applied—to ERISA benefit claims litigation, either under ERISA's Savings Clause or under federal common law.

This case presents the Court with an opportunity to clarify the scope of ERISA's Savings Clause and to confirm that the lower courts have acted properly in adopting state insurance law doctrines.

STATEMENT

The Ninth Circuit found that Respondent's notice and proof of claim were untimely under the express terms of the insurance policy providing benefits under his employer's long-term disability plan. Pet. App. 4a-5a. Nevertheless, the court held that the case should be remanded for further consideration of whether, under California's notice-prejudice rule, Petitioner suffered actual prejudice from the untimely notice. *Id.* at 6a.[2]

In holding that ERISA does not preempt the notice-prejudice rule, the court relied on its decision in *Cisneros v. UNUM Life Ins. Co. of America*, 134 F.3d 939 (9th Cir. 1998), *petition for cert. pending*, No. 97-1867. *Cisneros* held that the California notice-prejudice rule is saved from preemption by ERISA's Savings Clause, ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), as a law "which regulates insurance." *Id.* at 945-47. The

[2] In the alternative, the Ninth Circuit held that the case should be remanded to the district court for consideration of whether Respondent's employer acted as Petitioner's agent in administering the plan such that notice of the claim to the employer would be deemed notice to Petitioner under California's *Elfstrom* rule. Pet. App. at 21a-25a. *Amicus curiae* NELA will only address the notice-prejudice issue.

Cisneros court also considered adopting the notice-prejudice rule as federal common law, but rejected this approach. *Id.* at 947.[3]

SUMMARY OF ARGUMENT

Unlike pension plans, ERISA does not contain minimum requirements for welfare benefit plans. In addition, ERISA saves state laws "which regulate insurance" from preemption under the Savings Clause. ERISA § 514(b)(2)(A). Welfare benefit plans generally provide benefits through insurance policies. Congress intended that the interpretation of these ERISA plan insurance policies would be guided by state insurance law doctrines, consistent with the McCarran-Ferguson Act.

Thus, the federal courts have frequently looked to state insurance law for rules of decision in ERISA cases, either under the Savings Clause or as a source for federal common law. Although Petitioner predicts that the administration of ERISA plan insurance policies will be disrupted if state insurance law is applied to ERISA benefit claims, numerous state insurance law doctrines—including several of the specific examples cited by Petitioner—have already been used as rules of decision in ERISA cases without any such disruption. In some cases, insurance companies themselves have urged the courts to adopt state insurance law under ERISA.

[3] An earlier panel decision held that California's notice-prejudice rule applied under both the Savings Clause and as federal common law. 115 F.3d 669 (9th Cir. 1997), *withdrawn*, 134 F.3d 939 (9th Cir. 1998).

This Court should clarify that state laws regulating the terms and interpretation of an insurance policy are not preempted by ERISA, and confirm that the application of state insurance law doctrines is in keeping with Congress' expectation that the courts will develop a "federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (citing 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)) (other citations omitted).

ARGUMENT

I. THE FEDERAL COURTS HAVE APPLIED MANY STATE INSURANCE LAW DOCTRINES TO ERISA WELFARE BENEFIT CLAIMS, AND SHOULD CONTINUE TO LOOK TO STATE INSURANCE LAW FOR RULES OF DECISION IN ERISA CASES.

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, does not contain any substantive requirements for employee welfare benefit plans. Unlike pension benefit plans, welfare benefit plans are not subject to participation, vesting or benefit accrual rules under ERISA. *See* ERISA §§ 201 - 204, 29 U.S.C. §§ 1051 - 1054. In addition, most welfare benefit plans provide benefits through group insurance policies. (*See* Brief for Petitioner at fn. 9.) Because of the lack of statutory guidance in ERISA, the Savings Clause, and the longstanding regulation of insurance under state law pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012, the federal courts have turned to state insurance law doctrines for rules of decision in ERISA welfare benefit claims litigation.

A. State Insurance Law Doctrines Apply to ERISA Welfare Benefit Claims under ERISA's Savings Clause or as a Matter of Federal Common Law.

Contrary to Petitioner's assertion, the Court of Appeals did not open a Pandora's Box in holding that the notice-prejudice rule applies to a claim for benefits under an ERISA plan. The federal courts have for many years applied state insurance law doctrines to ERISA welfare benefit claims, either under ERISA's Savings Clause or under federal common law.

The state insurance law doctrines which have been used to decide ERISA benefit claims include the *contra proferentem* doctrine whereby ambiguous terms in insurance policies are construed against the insurer which drafted the policy; the allocation of the burden of proof and evidentiary presumptions; coordination of benefits rules; and rescission of the insurance policy based on fraudulent or material misrepresentation by the insured. Seen in this light, the Court of Appeals' holding that the California notice-prejudice rule applies to an ERISA welfare benefit plan insurance policy is merely an extension of well-established ERISA case law.

Petitioner includes several of these state insurance law doctrines in its "parade of horribles" which they claim will follow if the Ninth Circuit's ruling is upheld. (Brief for Petitioner at 47.) Despite Petitioner's dire predictions, ERISA welfare benefit plans have been subject to state insurance law doctrines for many years and still the sky has not fallen. Ironically, insurance companies themselves have frequently urged the courts to rescind ERISA plan insurance policies based on state insurance law doctrines.

Most of the courts which have applied these state insurance law doctrines have done so by adopting the doctrines as federal common law. When Congress enacted ERISA, it was not writing on a clean slate. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). "Congress is understood to legislate against a background of common law adjudicatory principles. . . . Thus, where a common-law principle is well-established . . . the court may take it as given that Congress has legislated with an expectation that the principles will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotations omitted).

The common law includes numerous rules of decision for insurance disputes. By creating an exception to preemption for state insurance law and by not enacting substantive rules for employee welfare benefit plans, Congress legislated with the expectation that the federal courts would apply state insurance law principles to ERISA welfare benefit claims. Thus, the application of state insurance law doctrines is in keeping with the congressional expectation that the courts will develop a "federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (citing 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)) (other citations omitted).

In the decision below and in other cases, the courts have held that state insurance laws are saved from preemption by ERISA's Savings Clause, ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), and therefore followed insurance law doctrines as applicable state law. *Amicus*

curiae agrees with Respondent's position that a state insurance law, such as California's notice-prejudice rule, is not preempted by ERISA if it meets this Court's "common-sense" test of regulating insurance.

The lower courts' uncertainty regarding the scope of the Savings Clause following this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), has led courts in some instances to adopt state insurance law doctrines as federal common law under ERISA rather than applying the state laws directly under the Savings Clause. This case presents this Court with an opportunity to clarify that state laws regulating the terms and interpretation of an insurance policy are not preempted by ERISA.

Whether the basis for applying state insurance law doctrines is the Savings Clause or federal common law, the underlying reasoning is the same—employees who are insured by an ERISA plan group insurance policy should have the same coverage as individuals who are covered by the identical insurance policy outside the context of an ERISA plan. Policy interpretation (as opposed to civil enforcement remedies) should not depend upon whether the insurance policy is issued to an ERISA plan or some other insured.

B. Contrary to Petitioner's Brief, Affirmance of the Court of Appeal's Decision Will Not Have a Significant Effect upon ERISA Plans Because Such Plans Are Already Subject to Numerous State Insurance Law Doctrines.

Petitioner's Brief presents an inaccurate portrait of the landscape of current ERISA law. Petitioner would have this Court believe that state insurance law doc-

trines are anathema to ERISA benefit claims. But, as shown below, the courts have applied many state insurance law doctrines to ERISA welfare benefit claims, either under ERISA's Savings Clause or under federal common law.

1. *Contra Proferentem*

In *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 539-41 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), the Ninth Circuit held that the rule of *contra proferentem* applies to an ambiguous term in an ERISA plan insurance contract. Under *contra proferentem*, ambiguous terms are interpreted in favor of providing coverage to the insured. The *Kunin* court stated that the doctrine applied to ERISA plan insurance policies either as a state insurance law saved from preemption or as federal common law. *Id.* at 539-40.

Following *Kunin,* almost every circuit has held that the rule of *contra proferentem* applies to ERISA plans maintained pursuant to an insurance contract.[4] The

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[4] *Hughes v. Boston Mutual Life Ins. Co.*, 26 F.3d 264, 268 (1st Cir. 1994); *Masella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98, 107 (2d Cir. 1991); *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257-58 (3d Cir. 1993); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1451-52 (5th Cir. 1995); *McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993); *Delk v. Durham Life Ins. Co.*, 959 F.2d 104, 106 (8th Cir. 1992); *Lee v. Blue Cross/Blue Shield of Alabama*, 10 F.3d 1547, 1551 (11th Cir. 1994). *But see Brewer v. Lincoln National Life Ins. Co.*, 921 F.2d 150, 153-54 & n.2 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991) (rejecting *Kunin*); *McMahan v. New England Mutual Life Ins. Co.*, 888 F.2d 426, (continued...)

First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have adopted *contra proferentem*, either as federal common law or without stating whether the Savings Clause or federal common law provided the basis for adopting the rule.

Petitioner cites *McMahan v. New England Mutual Life Ins. Co.*, 888 F.2d 426, 429-30 (6th Cir. 1989) (Petitioner's Brief at fn. 10), but, as demonstrated by the cases cited below, the Sixth Circuit stands alone in rejecting the *contra proferentem* doctrine under ERISA. (Petitioner also cites *Brewer v. Lincoln National Life Ins. Co.*, 921 F.2d 150, 153-54 & n.2 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991), which declines to follow *Kunin* (Petitioner's Brief at fn. 10), but the Eighth Circuit later held that *contra proferentem* should be applied to ambiguous terms in ERISA plan insurance policies when no common-sense meaning is evident. *Delk v. Durham Life Ins. Co.*, 959 F.2d 104, 106 (8th Cir. 1992).)

2. Allocation of the Burden of Proof and Evidentiary Presumptions.

In deciding claims arising under ERISA welfare benefit plan insurance contracts, the courts have also looked to state insurance law doctrines establishing the burden of proof and evidentiary presumptions. Thus, several circuits have applied the "basic rule of insurance law that the insured carries the burden of showing a covered loss has occurred and the insurer must prove

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[4] (...continued)
429-30 (6th Cir. 1989) (*contra proferentem* under state law preempted by ERISA).

facts that bring a loss within an exclusionary clause of the policy" as a rule of decision for ERISA claims. *McGee v. Equicor-Equitable*, 953 F.2d 1192, 1205 (10th Cir. 1992).[5]

Petitioner cites the California insurance law rule allocating the burden of proof for exclusionary clauses to the insurer and asserts that this rule would disrupt the administration of ERISA plans if the decision below is upheld. (Petitioner's Brief at 47.) However, as shown by the cases cited below, this rule has already been adopted by four circuits as a rule of decision for ERISA benefit claims. Similarly, in deciding an ERISA claim under an accidental death policy, the Eleventh Circuit adopted the state insurance law presumption against suicide and in favor of accidental death. *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir. 1998).

3. Coordination of Benefits Rules.

In *PM Group Life Ins. v. Western Growers Assur. Trust*, 953 F.2d 543 (9th Cir. 1992) (Kozinski, J.), both parents of a premature infant had medical coverage through ERISA plans; however, the plans had inconsistent coordination of benefits rules and disputed which plan would provide primary coverage. Since both plans were self-funded, the court held that they were not subject to state insurance regulation under the "deemer clause," ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), and ERISA therefore preempted the coordination of benefits regulation in the California administrative code. *Id.* at 545-46. In *dicta*, the court noted that state insurance law would govern the interpretation of coordination of benefits rules in cases where both ERISA plans are insured. *Id.* at 548 fn. 6.

[5] *See also, Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1220-21 (10th Cir. 1992) (insurer failed to meet its burden of proving that insured's treatment was a "dental service" under ERISA-governed policy exclusionary clause); *Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997); *Jenkins v. Montgomery Indus., Inc.*, 77 F.3d 740, 743 (4th Cir. 1996); *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 658 (8th Cir. 1992); *Cleary v. Knapp Shoes, Inc.*, 924 F.Supp. 309, 315-17 (D.Mass. 1996) (plan administrator had burden of proving that a covered injury fell within an exclusion provision).

In deciding the benefit claim, the court fashioned an appropriate coordination of benefits rule as a matter of federal common law. Relying on the National Association of Insurance Commissioners (NAIC) Model Regulations, the court adopted "the birthday rule," which places primary liability on the plan of the employee whose birthday falls earlier in the year. *Id.* at 547-48.

In *McGurl v. Trucking Employees of North Jersey Welfare Fund*, 124 F.3d 471 (3d Cir. 1997), the Third Circuit took a similar approach to a conflict between the "other insurance" provisions of two self-funded ERISA plans, each of which purported to provide at most secondary coverage to employees who were covered under both plans. The Third Circuit adopted the "employer first" rule in the NAIC Model Regulations—which had been adopted (at least in part) by 39 states—providing that the plan covering the person as an employee pays benefits first. The plan covering the same person as a dependent pays benefits second. *Id.* at 483-84.

By applying coordination of benefit rules such as the "birthday rule" and the "employer first" rule, the courts

effectively modify the terms of ERISA plans by adding an implied rule adopted from state insurance laws. Moreover, many of the other state insurance law doctrines which have been applied in ERISA cases also have the effect of adding an implied term to an ERISA plan insurance policy. Petitioner therefore is mistaken in asserting that "the Courts of Appeals have consistently held that ERISA bars the use of any common-law doctrines which . . . cause a departure from the written plan document." (Brief for Petitioner at 34.)

Insurance policies—like other ERISA plan documents—must comply with the provisions of ERISA. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, insurance provisions such as state-mandated benefits or coordination of benefit rules which are recognized under ERISA's Savings Clause or the federal common law of ERISA are implied plan terms even where they have been omitted from the policy.

4. Rescission Based on Fraudulent or Material Misrepresentation.

Although plan participants and beneficiaries typically urge courts to import state insurance law into ERISA disputes, there is at least one area in which insurance companies make the same argument—cases in which an insurance company seeks to rescind an ERISA-governed insurance policy based upon alleged misrepresentations made by the insured in his or her application. Since ERISA is silent on this issue, insurance companies have argued that the courts should apply the rescission statutes in state insurance codes or adopt the same rules as federal common law. Thus, it is puzzling that Petitioner includes rescission statutes from the California

Insurance Code in its "parade of horribles" which will follow if the decision below is upheld. (Brief for Petitioner at 47.)

The courts have looked to state insurance law in fashioning a federal common law doctrine permitting an ERISA plan insurer to rescind an insurance policy if the insured has made a fraudulent or material misrepresentation. In *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934 (6th Cir. 1997), the Sixth Circuit held that the Ohio statute permitting the rescission of insurance policies in such instances was preempted by ERISA. However, the Sixth Circuit adopted essentially the same rule as a matter of federal common law. *Id.* at 943. *See also, Tingle v. Pacific Mutual Insurance Co.*, 996 F.2d 105, 109 (5th Cir. 1993); *Security Life Ins. Co. v. Meyling*, 146 F.3d 1184 (9th Cir. 1998); *Hauser v. Life General Sec. Ins. Co.*, 56 F.3d 1330, 1335 (11th Cir. 1995) (assuming right of rescission exists under ERISA-created federal common law).[6]

CONCLUSION

The Ninth Circuit's adoption of the California notice-prejudice rule for ERISA benefit claims is consistent with well-established precedent. The rule is merely one of many state insurance law doctrines which the courts

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[6] The doctrines discussed above are by no means an exhaustive list of the state insurance law doctrines which have been applied in ERISA benefit claim litigation. For example, two circuits have adopted the "reasonable expectations" doctrine. *Wheeler v. Dynamic Engineering, Inc.*, 62 F.3d 634, 638 (4th Cir. 1995); *Saltarelli v. Bob Baker Medical Trust*, 35 F.3d 382, 386 (9th Cir. 1994).

have applied in deciding ERISA benefit claims, either under ERISA's Savings Clause or under federal common law.

The states have regulated insurance for more than 50 years following the passage of the McCarran-Ferguson Act, and the common law of insurance has developed over the course of centuries. The courts should not throw away this jurisprudence in deciding benefit claims under ERISA. Congress expressed its intention that state insurance law doctrines would remain in force by saving state insurance laws from preemption, directing the courts to develop a federal common law of ERISA, and omitting substantive requirements for welfare benefit plans from the statute.

In the event that the Court holds that California's notice-prejudice rule is not saved by the insurance savings clause, the Court should make clear that the courts could adopt a similar rule as a matter of federal common law under ERISA.

For the foregoing reasons, *amicus curiae* NELA respectfully urges that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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